UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

SERENA CONCRETE, INC.[1]

Employer

And

NORTHERN ILLINOIS DISTRICT COUNCIL OF OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION AFL-CIO , AND OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, LOCAL NO. 18

Petitioners

And

INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL NO. 6, AFL-CIO[2]

Intervenor

Case 13-RC-20738

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(*c*) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(*b*) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record[3] in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[4]

3. The labor organization(*s*) involved claim(*s*) to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(*c*)(*1*) and Section 2(*6*) and (*7*) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(*b*) of the Act:[5]

All full-time and regular part-time cement mason journeymen and cement mason apprentices employed by the Employer from its facility currently located in Shorewood, Illinois; excluding office clerical employees,

guards, professional employees and supervisors as defined by the Act and all other employees, or laborers engaged in related work.

DIRECTION OF ELECTION*

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(*s*) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(*s*) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Northern Illinois District Council of Operative Plasterers and Cement Masons International Association AFL-CIO and Cement Masons' International Association, Local No. 18 **or** International Union of Bricklayers & Allied Craftworkers, Local No. 6, AFL-CIO, **or** neither**.**

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. ***Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359, fn. 17 (1994).** Accordingly, it is hereby directed that within 7 days of the date of this Decision 2 copies of an election eligibility list, containing the full names and addresses of all of the eligible voters, shall be filed by the Employer with the undersigned Regional Director who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in **Suite 800, 200 West Adams Street, Chicago, Illinois 60606** on or before April 9, 2002 . No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court Building, 1099-14th Street, N.W., Washington, D.C. 20570.** This request must be received by the Board in Washington, D.C by April 16, 2002.

Dated April 2, 2002 at Chicago, Illinois.

/s/Elizabeth Kinney
Regional Director, Region 13

*/ The National Labor Relations Board provides the following rule with respect to the posting of election notices:

(a) Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Director in the mail. In all cases, the notices shall remain posted until the end of the election.

(b) The term "working day" shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays.

(c) A party shall be stopped from objection to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Director at least 5 working days prior to the commencement of the election that it has not received copies of the election notice.

1/ The names of the parties appear as amended at hearing and in their post-hearing briefs.

2/ The parties stipulated that the International Union of Bricklayers & Allied Craftworkers, Local 6, AFL-CIO (herein collectively referred to as the Intervenor or as Bricklayers Local 6) was a proper Intervenor in this proceeding. This stipulation was based upon a Section 8(f) agreement, referred to in the record as the Illinois Valley Contractors' Association Agreement, to which the Employer, the Intervenor and the Petitioners are bound, which covers employees sought by the Petitioners in the instant petition.

3/ The arguments advanced by the parties at the hearing and in their post-hearing briefs have been carefully considered.

4/ The Employer is a corporation engaged in concrete construction.

5/ The Petitioners, through the instant petition, seek to represent under Section 9(a) of the Act, a unit of the Employer's cement mason journeymen and cement mason apprentices throughout the territorial jurisdiction of the Petitioners, which includes the following counties in their entirely: Cook, DuPage, DeKalb, Grundy, Kane, Kendall, Lake, Kankakee, Iroquois, Winnebago, Boone, LaSalle, Bureau, Putnam, Livingston, McHenry, Will, Lee, Whiteside, Ogle, Carroll, JoDavies, Stephenson, Henry, Start, Woodford and Ford in the State of Illinois; and Dubuque, Delaware, Alamakee, Jackson, Clayton and Jones in the State of Iowa. In the alternative to representing a unit defined by the Petitioners' territorial jurisdiction, the Petitioners seek a unit comprised of all of the Employer's cement mason journeymen and cement mason apprentices without regard to geographical limitation.

The Employer took no position regarding the appropriateness of either Unit.

The Intervenor seeks dismissal of the Petition and maintains that the Illinois Valley Contractor's Association Agreement (hereafter referred to as the Illinois Valley Agreement) bars the instant petition. Alternatively the Intervenor maintains that the petitioned-for Unit is broader than that which the Petitioners have historically represented through its Section 8(f) agreements with the Employer, and argues, therefore, that the history of collective bargaining under Section 8(f) of the Act is controlling as to the scope of the unit under Board precedent. Thus, the Intervenor maintains that any unit found to be appropriate herein should specifically exclude DuPage, Kankakee, Iroquois, LaSalle, Henry, DeKalb, Bureau, Putnam, Kendall, Stark and Henry Counties in Illinois from its scope based on their historical exclusion, as evidenced in the Illinois Valley Agreement. Finally, the Intervenor maintains that it would be inappropriate to include in the unit counties in Iowa and/or Illinois in which the Employer has never done business or plans to do so in the future.

For the following reasons, I find that the petition should not be dismissed and that a Unit comprised of the Employer's cement masons, without regard to geographical limitations, is an appropriate unit.

FACTUAL SUMMARY:

Petitioners, through collective bargaining agreements signed with three of the District Council's affiliated Cement Mason Local Unions, Local 11, 502 and 803 and with Cement Masons Local 18, have a Section 8(f) bargaining relationship with the Employer for cement mason work performed within a portion of the petitioned-for geographic territory. The 8(f) agreements between the Petitioners affiliates and the Employer are multi-employer association agreements. By virtue of these 8(f) agreements for cement mason work in parts of LaSalle, Bureau and Putnam counties, all of Henry and Stark Counties and parts of Livingston, Woodford and Ford Counties, the Employer is bound to the Illinois Valley Agreement with Petitioners' Locals Nos. 11 and 18 and the Intervenors. Apparently this joint arrangement dividing this area between the Cement Masons and the Bricklayers came about due to agreements between the International Unions of the Petitioner (International Association of Operative Plasterers and Cement Masons, herein the "Operative Plasterers") and the Intervenor (International Union of Bricklayers & Allied Craftworkers, herein the "Bricklayers"), establishing certain geographical limitations on each other where there was overlapping coverage of job classifications.

In 1998, the Operative Plasterers unilaterally revoked its agreement with the Bricklayers regarding geographical restrictions. This action by the Operative Plasterers was upheld at the convention of the Building and Construction Trades Department of the AFL-CIO in July 2000. Thereafter, the Operative Plasters authorized the Petitioners to expand their geographic jurisdiction to include counties previously excluded from their jurisdiction pursuant to the former agreement between the International Unions. As a result, the Petitioners filed the instant petition seeking to become the certified representative under Section 9(a) of the Act of the employees of the Employer for the entire territory covered by the District Council, without regard to the previous geographical restrictions.

The Employer is located in Shorewood, Illinois, and is engaged in performing cement work primarily in Will, Grundy, and LaSalle Counties. During the past two years, the Employer has also performed small projects in Cook and Kendall counties. The Employer has not bid for work, nor does it plan to bid for work in other counties noted in the Petition. The Employer employs approximately 15 cement masons each month, 8 of whom are considered by the Employer to be its "core group" of regular employees. The core groups are all members of Cement Masons Local No. 11. In addition to this core group of cement masons, the Employer employs additional cement masons, depending upon job requirements, and generally obtains those individuals by contacting the various local union halls of the Petitioners. In staffing its projects, the Employer generally follows the Petitioners' 50/50 rule, which requires that 50% of the employees for a particular job come from the ranks of the cement masons local, which has jurisdiction over the job location. Apart from generally following this rule, the Employer makes no distinction in staffing particular jobs based upon the county location of the work. Nor does the Employer make any distinction in regard to job rules, wage

and fringe benefits and/or supervisors based on location. Instead, the Employer applies the wage and benefit rates of each employee's home local.

On or about January 16, 2002, the Employer entered into a Memorandum of Agreement with the Cement Masons District Council. Pursuant to that agreement, which binds the Employer to the Master Collective Bargaining agreements with all the Locals in the District Council and their respective area-wide or employer association collective-bargaining agreements, the member Locals of the District Council provide employees to perform cement mason work for the Employer throughout the territorial jurisdiction of the District Council. Prior to this Memorandum of Agreement, the Employer also had Section 8(f) collective bargaining relationships with Locals 11, 502 and 803.

The Employer has never hired any member of the Bricklayers to perform cement mason work. Nor has the Employer ever submitted fringe benefit fund contributions or working dues to the Intervenor when working within the territory covered by the Illinois Valley agreement.

ANALYSIS:

As noted above, the Intervenor seeks dismissal of the instant Petition maintaining that the 8(f) Illinois Valley Agreement to which it, the Petitioners and the Employer are parties serves as a contract bar. Contrary to the Intervenor's position, Board law is clear, pre-hire contracts in the construction industry under Section 8(f) do not constitute bars to a representation election under Section 9(c) of the Act due to the express language in Section 8(f) which, among other things, provides that "any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)." ***Burford, Inc.,* 130 NLRB 1641, 1642 (1961); *John Deklewa & Sons,* 282 NLRB 1375 (1987).** Thus, the Intervenor's position is without merit.

The Intervenor further argues that the petitioned-for unit is inappropriate inasmuch as it seeks to include work performed by the Employer in geographical areas, which have historically been affiliated, with the Intervenor. The initial inquiry, therefore, must be whether the unit sought by the Petitioner, which would include these areas, is an appropriate unit.

Section 9(b) of the National Labor Relations Act directs the Board to "decide in each case whether, in order to assure employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . .." "[T] he selection of an appropriate bargaining unit lies largely within the discretion of the Board whose decision, 'if not final, is rarely to be disturbed.'" *South Prairie Construction v. Operating Engineers Local* 627, 425 U.S. 800, 805 (1976)(citation omitted). There is nothing in the Act that requires the unit for bargaining be the only appropriate unit or the most appropriate unit – the Act only requires that the unit for bargaining be "appropriate" so as to assure employees the fullest freedom in exercising the rights guaranteed by the Act. *Overnite Transportation Co.* 322 NLRB 723 (1996);

Brand Precision Services, 313 NLRB 657 (1994); *Phoenix Resort Corp*., 308 NLRB 826 (1992). In defining the appropriate bargaining unit to ensure employees the fullest freedom in exercising the rights guaranteed by the Act, the key question is whether the employees share a sufficient community of interest. *Alois Box Co., Inc*., 326 NLRB 1177 (1998); *Washington Palm, Inc*., 314 NLRB 1122, 1127 (1994).

In determining whether employees share a sufficient community of interest to constitute an appropriate unit, the Board weighs various factors, including the similarity of skills, functions, and working conditions throughout the proposed unit; the central control of labor relations; transfer of employees among the Employer's other construction sites; and the extent of the parties' bargaining history. *P.J. Dick Contracting, Inc.,* 290 NLRB 150, 151 (1988), citing *Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965). The Board will also consider a difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of similar or dissimilar qualifications, training and skills; differences in job functions; amount of working time spent away from the facility; and integration of work functions. *Kalamazoo Paper Box Corp*., 136 NLRB 134, 137 (1962); *Banknote Corp. of America v. NLRB*, 84 F.3d 637, 647-648 (2d Cir. 1996).

Based upon the record herein, it is clear that the a unit comprised of the Employer's cement masons, without regard to geographical limitations, would be an appropriate unit. Thus, the record demonstrates that the Petitioners seek a single-employer unit consisting of all of the Employer's employees who are engaged in shared and clearly identifiable job functions and who share the same general terms and conditions of employment regardless of the job sites within the geographical jurisdiction of the Petitioners that they may be working on. A significant number of the employees contained in the petitioned-for unit constitute a "core group" of employees with continuity of employment from job to job with the Employer.

The Intervenor, however, contends that the petitioned-for unit is inappropriate because it is broader in scope than the historical bargaining unit in the 8(f) collective bargaining agreements between the Petitioners and the Employer. The Intervenor, based upon the following language in the Board's decision in *John Deklewa & Sons*, 282 NLRB 1375, 1377 (1987), asserts that the scope of the petitioned-for unit must be the same as that in the 8(f) agreement between the Petitioners and the Employer:

> [S] uch agreements [8f] will not bar the processing of valid petitions filed pursuant to Section 9(c) and Section 9(e) . . . in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement . . ..

The Intervenor asserts that Board's decision in *P.J. Dick Contracting, Inc*., 290 NLRB 150 (1988) supports its view that where there is a historical relationship under Section 8(f) of the Act, the Board's decision in *Deklewa* requires that the scope of the petitioned-for unit be the same as that found in the 8(f) agreement. In *P.J. Dick Contracting, Inc*., the Board rejected the petitioning union's request for a unit covering 33 counties, finding that the petitioning union's alternative request for a unit confined to the 11 counties it had

covered in its 8(f) agreements with the employer to be appropriate. In reaching that conclusion, the Board stated:

> [T] he Board's traditional deference to bargaining history is generally applicable in the construction industry. Indeed based on the limited evidence presented, it is the determinative factor in finding in this case that the 11 county jurisdiction of the MBA agreement is the appropriate unit. *Id.* at 151

While it is clear, based upon the foregoing, that bargaining history is a factor to be weighed and considering in determining whether a petitioned for unit is appropriate, I find that the Intervenor's reading of *Deklewa* language to be too restrictive. Bargaining history pursuant to 8(f) agreements is not the conclusive consideration in determining whether a petitioned-for unit is appropriate. The very language that the Board used in *Deklewa*, 282 NLRB 1375, 1377-78 (1987) "the appropriate unit *normally will be* the single employer's employees covered by the agreement" (emphasis added), clearly sets forth that 8(f) agreement unit is not necessarily conclusive as to the determination of the appropriate unit. Furthermore, the language in *Deklewa* cited by the Intervenor was used by the Board to express its rejection of the merger doctrine in 8(f) situations, rather than to define the scope of single employer units. Under the merger doctrine, the employees of a single employer that belonged to a multi-employer bargaining association were merged into a multi-employer bargaining unit. As such, the employees of the single employer could only exercise their right to select their bargaining representative in conjunction with all the other employees of the other employers who were included in the multi-employer bargaining unit. In *Deklewa*, the Board rejected the merger doctrine's application to representation petitions where the employees had been covered by multi-employer agreements under Section 8(f) of the Act in order to allow the employees of a single employer an opportunity to exercise their Section 7 rights to vote on whether to accept or reject the 8(f) bargaining representative. See *City Electric, Inc*., 288 NLRB 443, fn. 9 (1988). Thus, it is clear that Board's language in *Deklewa,* cited by the Intervenor, was not meant to limit the scope of a single employer unit in the construction industry under Section 9(b) of the Act to the unit defined by the previous 8(f) bargaining agreement.

The Board's decision in *P.J. Dick Contracting, Inc., supra,* also makes it clear that, while 8(f) bargaining history is a factor to be weighed in determining the appropriate unit, it is not conclusive. In finding the historical unit to be appropriate, the Board did not find that its decision in *Deklewa* compelled a finding that only the historical unit was appropriate. Rather, the Board made it clear that the broader unit sought by the petitioner might be appropriate; however, the Board found that the petitioner had failed to present any evidence to demonstrate its appropriateness. *P.J. Dick Contracting, supra,* at fn. 8.

While the Board gives substantial weight to bargaining history in furtherance of the statutory objective of stability in industrial relations[1], I find no basis on the record for giving the bargaining history involved herein weight over the other community of interest factors. For all intents and purposes, the Petitioners have been the collective bargaining representative of most of the Employer's employees for all purposes permissible under the Act. The historical geographical exclusion of the employees of the Employer when they work in certain counties from coverage of the 8(f) agreements between the Petitioners and the Employer has no discernible impact upon the employees and their community of interest. Further, the geographical exclusions as a practical matter have made no difference to the employees of the Employer with regard to their terms and conditions of employment. Thus, record evidence clearly demonstrates that the Employer has never hired members of the Bricklayer's Union, nor submitted fringe benefit contributions or working dues to the Intervenor for cement masons performing work in locations over which the Intervenor may historically have had jurisdiction. Based upon the foregoing, I find the Intervenor's argument unpersuasive. *Alley Drywall, Inc*., 333 NLRB No. 132 (2001).

Further, to find as the Intervenor contends, that the unit sought by the Petitioner must under Section 9(b) of the Act be confined geographically to the unit Petitioner represented under the 8(f) agreements only serves, on the facts herein, to perpetuate an arbitrary geographical division of the same employees into separate units based upon where they are working. The only basis on the record in the instant case for the historical geographical division of the units between the Petitioners and the Intervenor were political considerations of maintaining geographical integrity for the local unions without competition among the local unions regarding the representation of employees. The record evidence shows that the geographical divisions have little, if anything, to do with the terms and conditions of employees whom these locals represent. Here, it is the same group of employees working under the same general terms and conditions of employment whom the Intervenor would divide into different units depending solely on what county that they happen to be working in. Accordingly, the 8(f) bargaining history between the parties herein is not entitled to controlling weight over the community of

---

[1] This case and similar cases involving the same dispute between the Operative Plasters and Bricklayers does not directly raise an issue as to the appropriateness of the historical unit. Rather, the issue raised by this case and other similarly situated cases is whether an incumbent representive may seek an appropriate unit that expands or is different from the historical unit bur is otherwise appropriate on community of interest factors. This determination does not necessarily call into question the appropriateness of the historical unit and thus has less impact upon the stability of industrial relations than that which usually occurs when the historical unit is directly challenged as being inappropriate, which is the usual context in which the Board weighs the bargaining history of the historical unit. The Board has long recognized that there is more than one way in which employees of a given employer may appropriately be grouped for purposes of collective bargaining. *Rohstein Corp.,* 233 NLRB 545, 547 (1977). The instant petition only raises the issue of whether alternative unit that expands the historical unit is **an appropriate unit.** It does not require a finding that the historical unit is inappropriate.

interests that exists in the unit sought by the Petitioner. See *A.C. Pavement Striping Company, Inc.*, 296 NLRB 206, 210 (1989), (Board disregarded bargaining history where the record shows no rational basis exists for the two historical units other than being purely historical accidents).

Based upon the foregoing and the entire record herein, I find that Petitioners are not limited to seeking a unit confined to the unit covered under its prior 8(f) agreements and that, based upon a community of interest analysis, the unit sought by the Petitioners, including masons working in areas previously excluded from its jurisdiction, is appropriate.

There remains the issue of whether to describe the scope of the unit in terms of geographical coverage as originally sought by the Petitioners in their petition, or to describe the unit scope as Employer-wide unit without regard to geographical boundaries, which the Petitioners would, alternatively accept.

The Board has long held that a union's territorial jurisdiction and limitations do not generally affect the determination of the appropriate unit. *Groendyke Transport*, 171 NLRB 997, 998 (1968); *CCI Construction Co*., 326 NLRB 1319 (1998). Furthermore, with regard to describing units in geographic terms, the Board in *P.J. Dick Contracting, Inc.,* supra at 151, fn. 8 stated: "Historically, the Board has not defined the scope of an appropriate bargaining unit in geographic terms." In the instant case, the record demonstrates that the Employer does not perform work in many of the areas that the Petitioners specifically included in their original petition, including but not limited to all of the counties noted in northeastern Iowa. The record further demonstrates that the Employer does not intend to bid for work in these areas in the future. Further, the Intervenor objects to the specific inclusion of locations in which the Employer has never worked. Under these circumstances, I find no basis to grant a unit including geographical areas in which the Employer has never conducted business.

The parties stipulated that eligibility formula set forth in ***Daniel Construction Co.,* 133 NLRB 264 (1961)** will apply. There are approximately 15 employees in the Unit found appropriate.

347-4020-3350-1600
420-1200
420-1700
440-3350

Bars to Election-Contract
Unit-other Scope/Definition